# COMMENT

## THE OVERTHROW OF ATTORNEY-GENERAL *v.* GILL: COONEY *v.* KU-RING-GAI MUNICIPAL COUNCIL[1]

The refusal of the High Court in *Cooney v. Ku-ring-gai Municipal Council* to follow *Attorney-General (ex rel. Lumley) v. T. S. Gill & Son Pty Ltd*[2] should be received enthusiastically by public lawyers and others who consider that individuals should be restrained from breaking the law if their activities operate to the disadvantage of members of the public living in the vicinity. The long reign of *Attorney-General v. Gill* has ended. In *Gill's* case in 1927 the Full Court of the Supreme Court of Victoria declined to grant the Victorian Attorney-General an injunction to restrain the defendant from continuing with the erection of a factory on land situated in a residential area contrary to a by-law of the City of Prahran. The Attorney-General had sought the injunction on the relation of Lumley, a ratepayer of the municipality, who alleged he was injuriously affected by the defendant's acts which, according to the allegation, also amounted to an invasion of the rights of the ratepayers generally and of the public. The municipality had made no attempt to enforce its own by-law although an offence against the by-law could be punished by fines and continuing penalties.

According to the Court there was no doubt about the place of the Attorney-General as the guardian of public rights and interest, but when he sought an injunction, relief would be afforded only if the interests he desired to safeguard were of a character which equity would protect. Delivering the judgment for the Court, Dixon A-J. said:

> The required interest must present those features which belong to the wide category of rights recognized in equity as proprietary, and provide the ground upon which the jurisdiction to restrain their violation depends.[3]

Those features were found in the case such as those dealing with the adequate width of new streets, the alignment of buildings upon a street frontage, and uniformity in the width of a street. But the by-law of the City of Prahran, though it tended to promote the general welfare of the community, nevertheless did ' not take the form of any positive interest susceptible of enjoyment by His Majesty's subjects as of common right '.[4] That nothing analogous to an interest was created by the by-law derived support from consideration of the doctrines affecting restrictive covenants. A restriction of the kind prescribed by the by-law when imposed by covenant was enforceable by injunction only if

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[1] (1963) 37 A.L.J.R. 212. High Court of Australia; Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

[2] [1927] V.L.R. 22.

[3] *Ibid.* 31.

[4] *Ibid.* 33.

annexed to the ownership of neighbouring land so as to create a servitude. The benefits to the public arising from the by-law, on the other hand, could only be equated with those arising from a restrictive covenant in gross.

Unfortunately, a few years later in *Ramsay v. Aberfoyle Manufacturing Co. (Australia) Pty Ltd*[5] the paramountcy accorded the individual private interest in *Attorney-General v. Gill* was further buttressed. The majority judges either accepted or did not challenge *Gill's* case. Indeed, Rich J. went so far as to concur in what he described as an old-fashioned view of the jurisdiction of equity that found the growth of the injunction as repugnant rather than satisfying. McTiernan J. applied *Gill's* case observing that the principles stated in the case were unexceptionable. Starke J. in dissent was equally emphatic that *Gill's* case ran counter to a body of authority which should not be disregarded. In *Gill's* case Dixon A-J. had been troubled by some cases, notably Irish ones, in which the commission of offences punishable under statute had been restrained at the instance of the Attorney-General although no special ground appeared for the equitable remedy. He thought, however, it was by no means easy to refer the decisions to principle.

In the United Kingdom, the courts have, over the past thirty-odd years, attached more importance to the role of the Attorney-General as the guardian of the public welfare than to a conceptual description of the interests which equity will protect as the basis for the grant of an injunction. As the Court of Appeal pointed out in *Attorney-General v. Harris* in 1961,[6] the Attorney-General is no ordinary litigant but represents the public interest and the community at large. In *Harris'* case the court had no hesitation in granting an injunction in a suit brought on the relation of Manchester Corporation to restrain the defendants from continuing to operate a flower stall outside a cemetery in contravention of a statute. The defendants had been fined many times and the court regarded their persistent and deliberate flouting of the law as a grave and serious injury to the public which should be put to an end. The public did not have to suffer immediate injury because it had a larger and wider interest in seeing that laws were obeyed and order maintained. In so deciding, the court followed a line of cases commencing in 1931 with *Attorney-General v. Sharp*,[7] in which the defendant bus proprietor was restrained from plying for hire without a licence contrary to statute. In the view of the court, when the Attorney-General intervened to ask for relief the court should pay great heed to his intervention and it would, in the exercise of its discretion, normally grant an injunction unless there were most exceptional circumstances justifying the refusal to enforce the general right of the public to have its laws obeyed. As Devlin J. pointed out in *Attorney-General v. Bastow*,[8] in which an injunction was issued to restrain defendant's user of land

[5] (1935) 54 C.L.R. 230.
[6] [1961] 1 Q.B. 74.
[7] [1931] 1 Ch. 121.
[8] [1957] 1 Q B. 514.

as a caravan site contrary to a notice served pursuant to the Town and Country Planning Act, 1947, it was not necessary that the Attorney-General should thoroughly exhaust all other available remedies before seeking an injunction.

Such is the law in England, as it should be, placing the interests of the public ahead of those of the individual in laws serving obvious social purposes.

Individual judges of the Supreme Court of New South Wales were unwilling to accept fully the authority of *Attorney-General v. Gill* and the erosion of the decision reached a peak by 1960. In that year Myers J. decided in *Cumberland County Council v. Corben*[9] that State town planning legislation conferred a public right and advantage which entitled the Council to enforce the statutory prohibitions by injunction. This was not a relator action by the New South Wales Attorney-General, but section 587 of the Local Government Act, 1919 (N.S.W.) provides that in any case in which the Attorney-General might take proceedings on the relation of a Council with respect to enforcement provisions made by or under the Act, the Council shall be deemed to represent sufficiently the interests of the public and may take the proceedings in its own name. In this case a land owner, Corben, leased land in an area shown as green-belt under the County of Cumberland Planning Scheme Ordinance to someone who erected a store on the land and conducted a substantial retail business in fruit and vegetables. Myers J. did not embark on any detailed consideration of *Gill's* case or *Ramsay v. Aberfoyle.* After mentioning them he said that he would follow the English cases of *Attorney-General v. Bastow*[10] and *Attorney-General v. Smith*[11] because, although he had not been asked to follow those decisions, he considered that they were correct.

In October last year the *Ku-ring-gai Municipal Council* case came before the Full Court of the High Court on appeal from the Full Court of the Supreme Court of New South Wales. The central issue was again whether an injunction should be issued to restrain unlawful use of land declared to be residential under statute. Kitto, Taylor, Menzies and Windeyer JJ. decided to break with the past and put aside *Gill's* case. The plaintiff Council had brought proceedings by virtue of section 587 of the Local Government Act and was the respondent in the appeal, having been granted an injunction by the Supreme Court. The Council had, in the first instance, sought an injunction against the defendants claiming that they used a dwelling house for the purpose of trade or business of providing at cost refreshments and entertainment at functions held therein. This was contrary to provisions of a proclamation made under the Local Government Act declaring the area in which the dwelling was situated to be a residential district. Much argument before the High Court turned on the validity of the proclamation and whether

[9] (1960) 77 W.N. (N.S.W.) 650.
[10] [1957] 1 Q.B. 514.
[11] [1958] 2 Q.B. 173.

the defendants were, in any event, carrying on a ' trade ' as prohibited by the statutory instrument. The Court, by a majority of four to one, Dixon C.J. dissenting, determined both issues in favour of the Plaintiff and then proceeded to examine whether the case was a proper one for the issue of an injunction. The Chief Justice, who had delivered the decision of the Victorian Court in *Gill's* case thirty-six years before, by reason of his attitude on the other issues, did not have to consider the question. McTiernan J., who had applied *Gill's* case in *Ramsay v. Aberfoyle*, was not a member of the Bench; nor was Owen J.

Kitto, Taylor and Windeyer JJ. concurred in the observations of their brother, Menzies J., as to the jurisdiction of the Supreme Court to grant an injunction. Menzies J. dealt with *Attorney-General v. Gill* briefly and decisively. His Honour acknowledged that if the Court followed the case it would not grant an injunction. He noted the conflicting views of McTiernan J. and Starke J. in *Ramsay v. Aberfoyle* and concluded that the High Court had not on that occasion decided whether the limitation recognized in *Gill's* case should be accepted. Then, said His Honour, whatever was the position in 1927, it was apparent from the cases in New South Wales and in England that courts had granted injunctions or mandatory orders to protect benefits or advantages of the kind considered in *Gill's* case and even benefits or advantages that could not be regarded as having any resemblance at all to proprietary rights. After mentioning the various English and New South Wales authorities, including all those cases so far mentioned in this commentary, Menzies J. concluded that it would be contrary to the trend of authority since 1927 to accept now the limitation adopted in *Gill's* case upon the jurisdiction of a court of equity to grant injunctions. A proper case for an injunction was made out when it appeared that some person bound by what may be described as a municipal law imposing a restriction or prohibition upon the use of land in portion of a municipal area for the public benefit or advantage has broken, and would unless restrained, continue to break that law for his own advantage and to the possible disadvantage of members of the public living in the locality. The wide discretion of the court was an adequate safeguard against abuse of a salutary procedure.

The views of McTiernan and Owen JJ. are, of course, not known since they were not members of the Court hearing the case, but since four of the total complement of seven of the High Court judges have repudiated *Gill's* case it is safe enough to assume that it no longer stands as an authority. *Cooney's* case concerned a limitation on the user of land, as indeed most of the relevant cases have in England and Australia, and it could be said that Menzies J. has done no more than hold that a proper case for an injunction may arise where the public are affected by the wrongful use of land. However, the reasoning in support goes much further and the approval given to *Attorney-General v. Sharp*,[12] where an injunction was issued to restrain the defendant from operating an omnibus without a licence, shows clearly enough that whether a proper

[12] [1931] 1 Ch. 121.

case is made out will depend not so much on the particular description of the activity being challenged, but on its effect on members of the public. Further, it seems plain enough that immediate disadvantage or harm to members of the public does not have to be shown. It is sufficient that disadvantage or harm may possibly result.

In the Australian Capital Territory, where there is a leasehold system of tenure, leases are usually granted under the City Area Leases Ordinance 1936-1963. Section 9 of the Ordinance states that ' The land included in a lease shall not be used for any purpose other than the purpose specified in the lease '. The section is imperfect. Neither does it state who is bound by the prohibition nor does it provide a penalty for infringement. Private leaseholders must covenant with the Commonwealth that they will use their land for residential purposes only. In this way residential areas have arisen in Canberra with the inhabitants depending, as is so often the case, on the executive goodwill of the Commonwealth to safeguard their interests. As a lessor, however, the Commonwealth has a slovenly record and there have been many violations of the condition by individual leaseholders but, though the Minister for the Interior may determine a lease for breach of covenant, no action has resulted as neighbouring leaseholders have found to their cost. As one who holds a residential lease and observes the covenants, this writer views with envy the position in other parts of Australia where a landholder may seek the assistance of a State Attorney-General to prevent an individual in his neighbourhood from intruding into a residential area in pursuit of some trade or industry contrary to law. In the A.C.T. it would be necessary first to persuade the federal Attorney-General to take action though his colleague the Minister for the Interior declines to use his own extensive administrative powers. But apart therefrom, would the mere prohibition in the Ordinance on the use of land for a purpose other than that specified in the lease be a sufficient basis on which to institute proceedings ? In *Cooney v. Ku-ring-gai Municipal Council, Attorney-General v. Harris*[13] and the other leading cases in this area, the defendants committed statutory offences before suits for an injunction were brought against them. In principle, if a commission of an act is prohibited by statute the case for an injunction should be stronger rather than weaker because a penalty is not prescribed for disobedience.

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[13] [1961] 1 Q.B. 74.

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